IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.382 OF 1999.

The Regional Director Employees'
State Insurance Corporation,
Mumbai : Appellants.

versus

M/s.Homa Engineering Works,
Mumbai. : Respondents.

Mr.H.V.Mehta for the appellants.
Mr.Rajesh Gelani for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 7th March 2005.

ORAL ORDER

1. Heard Mr.Mehta for the appellants and Mr.Gelani for the respondents. This appeal is filed by the Regional Director Employees" State Insurance Corporation Mumbai (hereinafter referred to as "the ESI Corporation") against the order of the Employees Insurance Court Mumbai dated 6th May 1998 in Application (ESI)

No.138/1988. That was an application filed by the present respondents for a declaration that they are not liable to pay contribution as claimed by the corporation for the period in question and that orders of the opponents/Corporation dated 15/9/1987 and 13/9/1988 directing the applicants to deposit an amount of Rs.1,61,000/- and odd and Rs.9,161/- and odd were illegal and invalid. The contentions of the applicants/respondents were accepted by the Insurance Court and their application was allowed and necessary declaration was given and, therefore, the Corporation has filed and preferred this appeal.

2. The claim and contention of the applicants/respondents before the Insurance Court was that they are a partnership concern. They had a factory at Cotton Green, Mumbai, where they fabricated the machinery spare parts and accessories. It was registered under the Factories Act, 1948 and was covered under the ESI Act. But apart from this, the respondents were independently undertaking the work of servicing and maintenance of ships on various docks or at the stream/anchorage i.e. on the ship itself.

This work was not carried out in the factory nor in the premises of the factory. There is no functional integrality between manufacturing activity of the respondents in the factory and this servicing and maintenance job of ships undertaking by them. It was further their contention that the servicing and maintenance work of the ships has to be carried out at the docks or at the mid stream anchorage and the places where such work was carried out were owned by the Bombay Port Trust Authorities. This work was carried out through various contractors/sub contractors specialised in that particular job which the contractors would do either by themselves or by engaging their labour. The applicants/respondents were paying lump sum amount to the contractors at site. Therefore, in this background, the respondents contended that the impugned notices and the orders issued by the Corporation were totally illegal and invalid.

. The Insurance Court upheld the contention of the respondents and passed the order in favour of the respondents which is the subject matter of this appeal.

3. Mr.Mehta, appearing for the Corporation, vehemently and strenuously urged that the impugned order passed by the Insurance Court was totally wrong. Because the Insurance Court did not take into consideration the Functional Integrality. According to him, the type of the work that was sought to be covered under the provisions of ESI Act, as stated above, was supervised by the respondents and, therefore, the contractors or the labour employed by contractors were directly under the control of the respondents. He drew my attention to the different provisions of the ESI Act and, mainly relied upon the following judgments in support of his contentions.

FLR 1993 (66) 111 (ESI Corporation v. Abu Marble Mining Pvt.Ltd.;

1994 IL.L.J. SC 12 (ESI Corporation v. M/s.Harrisons Malayalam Pvt. Ltd.)

42 Factories Journal Reports Vl.89 (Rajkamal Transport & Anr. v. ESI Corporation);

AIR 1987 SC 447 (M/s.P.M.Patel & sons v. Union of India)

4. In the case of **M/s.P.M.Patel & Sons** the question was about the definition of "employee" and the Supreme Court held that the home worker rolling beedies at his home and delivering them to the manufacturer subject to the right of rejection of the manufacturer was the employee within the meaning of Employees' Provident Funds and Miscellaneous Provisions Act 1952. This case appears to have been cited by Mr.Mehta to show as to the extent to which the term "employee" could be interpreted.

. In my opinion, looking to the facts of the present appeal, this case is of no help to the appellants.

5. In the case of **Rajkamal Transport** the facts were that the appellants in that case had engaged hamalis for loading and unloading of the goods under taken by them for carriage as carriers. Respondents/corporation called upon

them to pay contribution under the ESI Act. The appellants disputed the liability. The contention before the Supreme Court was that there was no relationship of master and servant; no regular salary was paid by the appellants to the hamalis and there were no fixed hours of work for the hamalis and, therefore, the Hamalis could not be considered to be the employees of the appellants. The Supreme Court however did not find any force in this contention. Clause (ii) of Section 2(9) of the Act, according to the Supreme Court, envisages that they need not necessarily be directly employed by the employer. Those who are employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment are the employees within the meaning of Section 2(9) of the Act.

. Thereafter while considering its own judgment in **Royal Talkies v. ESI Corporation (1978) 53 FJR 319, 325,** the Supreme Court

observed as under :-

> The whole object of the statute is to make the principal employer primarily liable for the insurance of kind of employees on the premises, whether they are there in the work or are merely in connection with the work of the establishment."

Thereafter again while referring its own judgment in **Kirloskar Brothers Ltd. v. ESI Corporation, (1996) 88 FJR 602** the Supreme Court observed as under :-

> "The test of predominant business activity or too remote a connection are not relevant. The employee need not necessarily be the one integrally or predominantly connected with the entire business or trading activities. The true test is control by the principal employer over the employee. That test will alone be the relevant test."

Ultimately the Supreme Court dismissed the appeal

filed by Rajkamal Transport and ors.

6. In the next case of **M/s.Harrisons Malayalam Pvt. Ltd.** the only question before the Supreme Court was, "whether the employees of the contractor engaged by the respondent-company to execute certain contract were covered by the Employees State Insurance Act, 1948, and, the Supreme Court held that, "it was the duty of the respondent-company to get the necessary details of the workmen employed by the contractor at the commencement of the contract since the primary responsibility of payment of the contribution is on the principal employer." On the admitted fact the Supreme Court held that the respondent-company had engaged the contractor to execute the work, it was their duty to get the temporary identity certificates issued to the workmen.

7. The first case relied upon by Mr.Mehta is **Abu Marble Mining Pvt. Ltd.** In that case the respondent/company was doing three types of works and the third kind of work which was relevant for the purpose of that appeal and was called a "complete contract" was the work of supplying the

marble to the customers, cut it, finish it and also fix the marble tiles at the site and all this work was done by the respondent/company. In that case Justice Savant, after considering the provisions and definition of work "employee" under Section(9)(ii) of the Act and after considering number of judgments of the Supreme Court considered the evidence adduced by the parties. On page 123 of the reported judgment the evidence was discussed in the following manner :-

> " In this view of the matter, I am of the view that on the evidence on record in the present case, the work done by the marble fixing contractor must be held to be done under the supervision of the principal employer, namely, the respondent-company. On the evidence of Ratanlal Sharma, Ex.48, and Sattbodh, Ex.49, it is clear beyond doubt that Ratanlal Sharma accepted the work from none-else and that he carried all his work of marble fixing under the supervision of the respondent-company. The respondent company has the polishing

machines. Ratanlal Sharma does not take the direct contract. He only does labour work and the marble, cement etc. everything is supplied by the respondent-company. These are the clear admissions of the contractor who does the job of marble fixing. similarly the evidence of Sattbodh, the director of the respondent-company, shows that the third type of activity of the company was to take complete contract' which includes supply, cutting, finishing and fixing the marble tiles. Everything was done by the company. If there was any complaint in the execution of the work, or its manner the complaint was made by the customers to the respondent-company and the company was to set right the things by giving necessary directions to the contractor. The responsibility of lying the marble in case of such 'complete contract' is always of the respondent-company and the concluding portion of the cross-examination of Sattbodh shows that the company was responsible for completing the work to the satisfaction

> of the customers. In my view, this leaves no manner of doubt whatever that the marble fixer in the present case was employed under the supervision of the principal employer and, indeed, in the facts of this case he was his agent on the work which was ordinarily the part of the work of the factory or establishment or which is preliminary to the work carried on. Thus the employees of the marble fixer could be squarely covered by the definition of word 'employee' appearing in clause (9) of Section 2 of the E.S.I. Act, 1948.

8. From the aforesaid judgment of Justice Sawant and also of the Supreme Court it will be clear that what matters in a particular_ case is the evidence that was come on record and, therefore, it is only the evidence on the basis of which the Court can come to the conclusion whether the ESI Act applies or not.

9. Therefore, in this present appeal also the evidence will have to be considered and then only legal submissions or submissions made by

Mr.Mehta, in particular, about the applicability of the Act will become relevant requiring interpretation and application. The evidence as adduced ;by the parties shows that the Respondent/company examined one Pradip Chalke and Appellant/corporation examined one Govardhandas Tekwani to prove Report (Exhibit 36). The corporation also examined one Aditya Rao who was the Insurance Inspector. This is, therefore, the only evidence on record i.e. the Company has examined one witness and the corporation has examined two witnesses.

. Coming to the evidence of witness of the Company Mr.Chalke, he has stated that they were doing work of repairing machinery in the factory. But they were getting’ the work of ship repairing and that work was done through outsiders who were specialised in a particular job. The repairing work that was carried out was, main engineer repairing, repairing of various types of valves, pipe lines, carpentry work etc. This work was done on the ship in the midstream. The area where the ship was anchored in the mid stream belonged to Bombay Port Trust. At times the ships were also anchored outside the B.P.T.

Limits. Mr.Chalke further stated that they appointed contractors for getting specialised job work done on the ship. The contractor employed his own people and after the job was over, they were paying lump sump amount to the contractor as agreed between them and the contractor through negotiations and, they debited this amount in their accounts under the head "Casual Labour Account. He further stated that because they were not engaging the workers directly and the persons engaged by the contractor were highly skilled because the job was a specialised job and the contractor was to pay rate of Rs.200/- per day to the labour depending on the nature of the work. This witness, then proved number of other documents from Sr.Nos.2,3,5,7,10,12,14 and 20 filed with Exhibit 21. This is the evidence given by this witness Chalke in the Examination-in-chief, wherein, he has categorically stated as to the nature of the work undertaken by them. He has stated that it was the work of ship repairing at site and was a specialised skill job and, their role was merely to engage the contractors who were specialised in that job of particular work. From his evidence it is clear that the respondent/company was

engaging different contractors for different works on the ships

. It has to be noted at this juncture that the cross examination of this only but important witness of the company by the Corporation is absolutely zero value. The Corporation has not been able to shatter him from his evidence nor succeeded in showing that whatever he has stated was false and contrary to the record. His cross examination is very short and cryptic and it has not brought anything on record to support the contentions of the corporation.

. In the cross examination the witness has stated that the work of ships repairing was being supervised by the supervisors of the contractor. The contractor was paying to the labourers appointed by him for the work. The contractor did not give any bill to them. They were obtaining the signatures of the contractor on the voucher. The entries under Casual Labour Account were the entries of the amounts paid to the contractor. Thereafter this witness Chalke showed his willingness to produce vouchers and,

accordingly they were produced. The cross examination thereafter is concluded by putting six questions to him and, not a single answer is supporting the case of the corporation nor it destroys the evidence given by the witness in chief.

10. Therefore, in view of the judgment of Justice Sawant, referred to above, the applicability of the Act depends upon the facts and circumstances proved on record and, when witness Chalke for the Company has in clear and unequivocal terms stated about the nature of the work done by them and what was their role in the work, then there is nothing to hold that the respondent/company was supervising the work or that it has control over the work done by the contractor. Admittedly, the Company is not an expert or skilled-in for performing different types of repairing jobs on the ships. They were engaging the contractors who were skilled and specialised in that particular job and in turn getting the work done on the ships from the skilled labourers of the contractors. The witness Chalke has given explanation about the entries made in their account books under head

Causal Labour Account. Nothing is brought out on record to show that these are false entries or these entries suppress something as claimed by the corporation.

11. As against this, the Corporation has examined two witnesses. One was Mr.Govardhandas Tekwani. His evidence runs into four lines. He has stated that he saw the reports filed at page Nos. 21 to 26 and at page 33 and they are prepared by him during his visit. They bear his signature.

12. Then another witness was Mr. Aditya Rao. He has stated that he was working as Insurance Inspector. On 20.2.1984 he visited the office of the respondents/company. He prepared the inspector report of his visit as Exhibit 15. In the cross examination he admitted that when he went to the establishments of the respondents he found that 41 workers working there and the casual labourers, mentioned in the application, were not working in the premises. He also admitted that all these concerned workmen were

working on ships, and he also admitted that contribution is claimed on the amounts paid to these contractors. He admitted that he was told that those workers were receiving Rs.99.95 per day.

13. This is the only evidence brought on record. It is clear that the evidence of two witnesses of the Corporation does not at all prove anything which now the Corporation wants to contend. Witness Chalke has stated about the nature of work on ships undertaken by them and since, the evidence is the basis of coming to any conclusion either this way or that way, then from the evidence of Chalke it is clear that the Insurance Court was justified in allowing their application. I do not find any reason to come to any different conclusion. Hence I pass the following order.

:ORDER:

The appeal is dismissed.

No order as to costs.

[D.G. DESHPANDE]

07/03/2005 JUDGE.